No. 3830

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT '7

IN THE MATTER OF
GEORGE R. JESSEE, Bankrupt,
J. F. HERRICK, as Trustee of the Estate of George R. Jessee, Bankrupt,
Petitioner and Appellant,
vs.
FIRST NATIONAL BANK OF COLVILLE, WASHINGTON, a corporation,
Respondent and Appellee.

No. 3830
PETITION FOR REHEARING

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Filed:_____Clerk

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The Respondent-Appellee respectfully petitions the Court to grant a rehearing of this cause.

INTRODUCTORY.

As we have no doubt that the majority has considered the reasoning of Judge Gilbert's dissenting opinion, we will not discuss the same in this petition. While agreeing with Judge Gilbert, we shall, for the purpose of this Petition and this petition only, concede that he is wrong. Likewise, and for the same reasons, we shall concede

that a chattel mortgage executed in the state of Washington must, as against existing creditors, contain an affidavit of good faith and an acknowledgment, which shall upon their face substantially comply with our local statutes, without the assistance of any extrinsic evidence.

ARGUMENT

THE REYNOLDS CASE

About a quarter of a century ago, Judge Hunt, speaking for the Supreme Sourt of Montana, decided the case of Reynolds vs. Fitzpatrick, 23 Montana, 52, 57 Pac. 452. The majority opinion in this case is bottomed on the Reynolds case, which latter case we have very carefully read. The statute of Montana there under consideration, like ours, require a chattel mortgage, as against creditors, to contain an affidavit of good faith and to be acknowledged. From the opinion in the Reynolds case, it does not appear that the mortgage there in question was acknowledged, but we take it that it was. It does appear that while the affidavit of good faith was signed by the parties, the Notary neither signed nor affixed his seal to the same. It is patent that no question was presented to the court in the Reynolds case as to whether the signature and seal to the acknowledgment could be as a matter of law, held to apply to the affidavit of good faith as well as to the acknowledgment. This question was not presented to any of the courts in any of the cases cited either in the Reynolds case or the majority opinion herein. We may remark in passing that, in

Whitehead vs. Hamilton Rubber Co., 53 N. J. Eq., 454, cited in Judge Gilbert's opinion, the case of Westerfield vs. Bried, 26 N. J. Eq., 357 is distinguished. An examination of these two cases will show the latter case is on all fours with the case at bar.

THE LAW OF WASHINGTON.

As the construction of our Washington statutes by our Washington courts is binding upon this court, let us see what the statute in question says and what our courts have said about the statute. Upon the question of the powers and duties of a Notary it is required that, save in court proceedings, when he shall "sign any instrument officially, he shall in addition to his name and the words 'notary public' *add his place of residence* and affix his official seal." (Rem. 1915 Code, Sec. 8299). It is therefore plain that in authenticating a chattel mortgage the notary must authenticate both the affidavit of good faith and the acknowledgment. Under our law, either the affidavit and acknowledgment must each be complete upon its face or reference may be had in the case of a formal defect in the affidavit, to the acknowledgment, or vice versa. In the one case the rule of strict construction and literal and technical compliance with the statute would be invoked. In the other case, the rule of liberal construction and a substantial compliance with the spirit of the statute would be invoked.

In Montana the rule at the time of the decision in the Reynolds case was that of strict construction. (See

page 454, 57 Pac.) In Washington the reverse and general rule is followed.

Vincent vs. Snoqualmie etc. Co., 7 Wash. 566.
Woods vs. Young Lumber Co., 107 *Wash.* 432.

We therefore see that the majority opinion, in passing upon a cause originating in the state of Washington, and involving the construction of Washington laws, has declined to follow that construction and principle of construction laid down by the Washington courts, has adopted another and different rule laid down by the Montana courts. In other words, it has decided a Washington case according to Montana law. When we say this, we do not intend to waive our theory that the question here involved was not submitted to Judge Hunt in the Reynolds case.

At this point we attach a copy of the form customarily used in chattel mortgages in this state being the form actually used in this case.

STATE OF WASHINGTON,
*County of*_____ } *ss.*

_____, being first duly sworn, on oath depose__ and say__, that __he__, _____mortgagor__ above named and that this mortgage is made in good faith without any design to hinder, delay or defraud creditors; and that __he__ do____ further swear that __he__ own__ said chattels as herein described and they are free and clear from any encumbrances or liens, excepting the within mortgage.

_____

_____

Subscribed and sworn to before me this_____ day of _____, 19____

_____

Notary Public in and for the State of Washington,
residing at _____

STATE OF WASHINGTON,
*County of*_____ } *ss.*

On this_____day of_____A. D. 19__, before me, a Notary Public in and for said state, personally appeared _____, to me known to be the individual__described in and who executed the within instrument and acknowledged that __he__ signed and sealed the same as _____ free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS My hand and official seal the day and year in this certificate first above written.

_____

Notary Public in and for the State of Washington,
residing at _____

It will be noted that both the affidavit and the acknowledgment are apparently separate instruments. That as to the attestation clause, the blanks require two signatures by the notary and the insertion of his place of residence in two places. He is also required to affix two seals if a strict and technical rule shall be invoked. We have therefore three statutory essentials to a valid notarial act (a) signature, (b) the residence, (c) the seal.

Under the law, so far as the legislative will is concerned, it is patent that neither one or the other of these requirements may be given more effect than the others. Yet, what has the Washington Supreme Court held? In the Vincent case, it held that where there were two seals, two notarial signatures, one notarial address in the acknowledgment, but none in the affidavit, that reference could be made to the address in the acknowledgment and the mortgage was valid. In the Woods case, it held that where there were two signatures, two addresses, one seal and that in the acknowledgment, that the affidavit of good faith, being without a seal, could be aided by applying to it the seal to the acknowledgment. The language of the Supreme court of Washington in the Woods case is illuminating on this question. It is said:

> "We are quite convinced, however, that, under our statute, there is nothing preventing the notary evidencing the two acts by one certificate, and that, under the circumstances here shown, he may be considered as having done so, in so far as the attaching of his official seal is concerned."

It will be observed that neither in the Woods case or in the case therein cited is it said that, as a matter of fact, the notary intended the one seal to apply to the two instruments. Our common sense teaches us that the contrary was the fact.

In the Woods case and cases therein cited, in the Vincent case and in the case at bar it is evident that the omission of the address, the seal and the signature, respectively were but oversights. The law in regard thereto has been fixed by the Supreme court of the state of Washington. It is, in our opinion, the duty of this Court to follow it. It is a wholesome rule, founded on good faith and fair play, as is said in the Woods case. If the opinion of the learned district judge shall finally be declared to be the law of this cause, then upon questions involving the validity of chattel mortgages, the federal and state courts in this state will be in accord. If, on the other hand, the majority opinion shall stand as the law, then the law in the two jurisdictions will be in hopeless conflict. Then indeed, will subordinate courts in the diverse jurisdictions be at sea in deciding causes. It is this diversity of judicial opinions and decisions which is endeavored to be avoided by the rule that the construction given state statutes by state courts is binding upon federal courts and the construction given federal statutes by federal courts of last resort is binding upon state courts. This rule should be applied here.

In conclusion, we are aware of the difficulty in attempting to change the views apparently maintained by

Judge Hunt for nearly a quarter of a century. We however, suggest that as hereinbefore indicated, first, that the question here presented, was not presented to him in the Reynolds case; and, secondly, that there, he was deciding in Montana a case arising upon a Montana statute, in a state where the doctrine of strict construction was in force. Here, the statute is a Washington statute, and the doctrine of liberal construction applies.

For the reasons given, we believe this petition should be granted.

Respectfully submitted,

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